



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 12, 1996

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701

OR96-2380

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 102353.

The Texas Department of Transportation (the "department") received a request for the latest bridge inspection report ("BRINSAP") for the Woodville Overpass Bridge Structure at Highway 6. However, the department seeks to withhold the BRINSAP based on section 552.101 of the Government Code. You enclosed a copy of the BRINSAP the department seeks to withhold.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

The instant request deals with information developed through an inspection undertaken by the department to identify possible safety problems with a bridge. You contend that the information is confidential under section 409 of title 23 of the United States Code which provides:

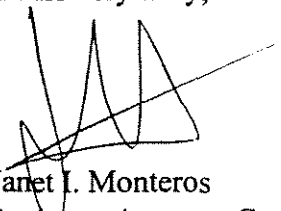
Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds *shall not be subject to discovery or admitted into*

evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.
[Emphasis added.]

Section 409 deals specifically with court proceedings. The information is protected from "discovery" or from being "admitted into evidence" in state or federal court, or from being "considered for other purposes in any action for damages." While section 409 protects the department from producing the report in a lawsuit or having the report used as evidence against it in a lawsuit, it does not prohibit the department from releasing the reports, or make the information confidential outside of the litigation context. Open Records Decision No. 561 (1990), upon which you rely, dealt with information which was expressly confidential under federal law, and is therefore distinguishable. Open Records Decision No. 561 (1990) at 7; *see also* Attorney General Opinion JM-830 (1987) (state agencies must have *specific* authority under state or federal law to make information confidential).¹ Furthermore, this office has determined that section 552.101 does not cover discovery privileges. *See* Open Records Decision No. 575 (1990). Accordingly, you may not withhold the requested BRINSAP under section 552.101 of the Government Code.²

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

¹We additionally note that the department relies on a case whose holding is now subject to challenge. Although the Tennessee Court of Appeals in *Tony Seaton v. Carl Johnson, et al*, 898 S.W.2d 232 at 237 (Tenn.1995), stated that it "chooses to follow 'the clear weight of authority' cited above and to adopt the holding of *Southern Pacific*," that holding was subsequently *vacated*. *Southern Pacific Transp. Co. vs. Hon. Michael A. Yarnell, et al*, 890 P.2d 611 (Ariz. 1995) (en banc), *cert. denied*, 116 S.Ct. 352 (1995).

²At this time only the United States Court of Appeals for the Eighth Circuit reads the statute, 23 U.S.C. 409, so broadly as to even preclude disclosure of data derived from other sources once that data is also compiled in a statutory report. *See Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (excluding even a newspaper).

Ref.: ID# 102353

Enclosure: Submitted document

cc: Mr. Patrick K. Givens, P.E.
Rimkus
Eight Greenway Plaza, Suite 500
Houston, Texas 77046
(w/o enclosure)